**DANAHARTA MANAGERS SDN BHD**

**v.**

**KHEE CHEONG MESIN JAHIT & LETRIK SDN BHD & ORS**

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CIVIL SUIT NO: 22-34-2001]
25 SEPTEMBER 2008

***COMPANY LAW:*** *Debenture - Fixed and floating charge - Breach of terms - Allegation of - First defendant created charges under the provisions of the National Land Code in respect of property in third defendant's favour - Whether contravened terms of debenture - Whether first defendant only holding property as bare trustee for third defendant - Whether third defendant could be deprived of its rights - Whether third defendant's interest takes precedence to that of plaintiff - Whether fraud was committed - Companies Act 1965, s. 108*

***COMPANY LAW:*** *Debenture - Fixed and floating charge - Debenture duly registered under the Companies Act 1965 - Effect - Companies Act 1965, s. 108 - Terms of debenture - Whether contravened - First defendant created charges under the provisions of the National Land Code in respect of property in third defendant's favour - Whether first defendant only holding property as bare trustee for third defendant - Whether third defendant could be deprived of its rights - Whether third defendant's interest takes precedence to that of plaintiff - Whether fraud was committed*

The first defendant, on 25 June 1997, granted the plaintiff's predecessor in title, Sime Bank Berhad, a debenture in consideration of certain banking facilities granted to them. The said debenture was secured by fixed and floating charge over the first defendant's property, both present and future together with the first defendant's covenant to execute legal or other charges in favour of Sime Bank on any property thereafter acquired by them when so requested by Sime Bank. By cl. 3.03 of the same, the first defendant shall not during the subsistence of the debenture execute any form of charge, mortgage, debenture, lien or pledge in respect of any of its assets covered by the said debenture without the written consent of Sime Bank. The particulars of the said debenture together with its terms and prohibitions were

registered with the Registrar of Companies pursuant to s. 108 of the Companies Act 1965. The said debenture became vested with the plaintiff pursuant to a vesting certificate issued by the High Court on 1 March 1999. The plaintiff herein claimed that the first defendant had breached the terms of the said debenture by creating six National Land Code (NLC) charges in respect of a certain Bakawali property in favour of the third defendant without their consent as security for the banking facilities granted by the third defendant. It was thus the contention of the plaintiff that once the plaintiff's debenture was registered under s. 108 of the Companies Act 1965, the third defendant should have or be deemed to have had notice of the plaintiff's interest in the matter of Bakawali property and that further transactions of the same must be subjected to the said debenture. Further, the plaintiff contended that the first defendant had committed fraud and that the third defendant was privy to the commission of the said fraud as against the plaintiff. The plaintiff thus proceeded against the third defendant for a declaration that the registered interests of the third defendant under the aforesaid NLC charges was in each case not indefeasible and consequent thereto, an order that the said registered interests be set aside. However, the facts herein showed that the third defendant's predecessor, Chung Khiaw Bank Ltd (CBKL) had granted the first defendant loan facilities to purchase the said Bakawali property. To secure the said facilities, a Loan Agreement Cum Deed of Assignment (LACDA) was entered between the first defendant and CKBL on 20 November 1993. The rights, titles and interests of the first defendant under the said sales and purchase agreement were absolutely assigned to CKBL as security for the said facilities. Additionally, the first defendant was prohibited during the continuance of the LACDA from among others, executing any form of debenture whether fixed or floating over the Bakawali property without the written consent of CKBL. The said LACDA was registered with the Registrar of Companies on 27 November 1993. The first defendant eventually became the registered proprietor of the Bakawali property on 25 May 1995 when the document of title of the said property was issued on 11 November 1994. Thereafter, pursuant to the terms of LACDA, the first defendant proceeded to replace the LACDA with legal charges under the provisions of the NLC on 21 April 1998. The said charges were the six NLC charges which formed the basis of the plaintiff's claim.

**Held (dismissing plaintiff's claim with costs):**

**(1)** The LACDA was lodged with the ROC in compliance with s. 108 of the Companies Act 1965. Upon such registration, the plaintiff should have or deemed to have knowledge/notice of the third defendant's interest in respect of Bakawali property through the LACDA. Though the LACDA provides for consent, the plaintiff did not obtain the said consent from the third defendant before proceeding to create the 25 June 1997 debenture. The cumulative impact of all these was that the third defendant's interest in the Bakawali land was safe. The first defendant could not now pass the title or interest in the said property to the plaintiff as the said property was encumbered with the interest of the third defendant at the material time. In short, there was no interest or title that the first defendant could pass around without the consent of the third defendant. There was nothing for the third defendant to take away from the plaintiff for all along the interest in the Bakawali property had been with the third defendant ever since the creation and registration of the LACDA. Indeed, the first defendant was only holding the land and/or interest therein as bare trustee for the third defendant. (para 29)

**(2)** Though the third defendant's interest through the LACDA (20 November 1993) came first in point of time in relation to the plaintiff's debenture (25 June 1997), but the NLC charges were created on 21 April 1998 which was subsequent to the creation of the plaintiff's debenture. However, the creation or registration of the NLC charges subsequent to the plaintiff's debenture could not be taken in isolation with the preceding events. The registration of the NLC charges were part and parcel of the LACDA. The third defendant was only enforcing their rights under the LACDA. The delay in the registration of the charges was without a doubt due to the delay in the issuance of the document of title of the said property which was occasioned through no fault of either the first or third defendant. Consequently, the third defendant certainly could not be deprived of its rights to enforce the terms of the LACDA by insisting that the first defendant do replace the loan agreement cum deed of assignment with legal charges under the provisions of the NLC. The creation of the six NLC charges was thus proper and regular. There could not

have been any fraud in enforcing one's rights under the law or under the terms of a regular contract. Upon the notion that the NLC charges were part and parcel of the LACDA, the third defendant's interest in the priority ranking was thus not affected. The third defendant's interest without a doubt took precedence to that of the plaintiff. The Bakawali property had from the very beginning been assigned to the third defendant's predecessor in title and as such it did not fall under the plaintiff's debenture dated 25 June 1997. (paras 30, 31 & 33)

**Case(s) referred to:**
*Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21* ***(refd)***
*Malaysian International Merchant Bankers Bhd v. Highland Chocolate and Confectionery Sdn Bhd & Anor (No 2) [1998] 4 CLJ Supp 32 HC* ***(refd)***
*Lee Tee & Anor v. Seek Lai Neo & Anor [2000] 2 CLJ 761 CA* ***(refd)***
*Mohamed Isa Hj Ibrahim [1967] 1 LNS 105* ***(refd)***
*Public Finance Bhd v. Narayanasamy [1971] 1 LNS 107* ***(refd)***

**Legislation referred to:**
Companies Act 1965, s. 108
National Land Code, s. 340(2)(a)

*For the plaintiff/appellant - M/s WY Chan & Roy*
*For the defendant/respondent - M/s LM Ong & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

### Ahmadi Asnawi JC:

**[1]** On 25 June 1997 the 1st defendant granted the plaintiff's predecessor in title, Sime Bank Berhad, a debenture in consideration of certain banking facilities granted to them as indicated at pp. 137 to 163 of Ikatan Dokumen Bersesama (plaintiff, defendan pertama dan ketiga) marked as "AB1". The said debenture was secured by fixed and floating charge over the 1st defendant's property, both present and future together with the 1st defendant's covenant to execute legal or other charges in favour of Sime Bank on any property thereafter acquired by them when so requested by Sime Bank.

**[2]** By cl. 3.03 of the same the 1st defendant shall not during the subsistence of the debenture execute any form of charge, mortgage, debenture, lien or pledge in respect of any of its assets covered by the said debenture without the written consent of Sime Bank.

**[3]** The particulars of the said debenture together with its terms and prohibitions were set out in Form 34 dated 26 June 1997 and registered with the registrar of companies with Form 40 on 30 June 1997, as shown at pp. 165 to 175 of AB1 pursuant to s. 108 of the Companies Act 1965.

**[4]** The said debenture became vested with the plaintiff pursuant to a vesting certificate issued by the High Court on 1 March 1999.

**[5]** The plaintiff now claims that the 1st defendant had breached the terms of the said debenture by creating 6 National Land Code 1965 (NLC) charges in respect of certain Bakawali property in favour of the 3rd defendant without their consent on 21 April 1998 as security for the banking facilities granted by the 3rd defendant to the 1st defendant *vide* the following presentations:

(i) No. Per. 20337/98 Jilid 4259 Folio 70

(ii) No. Per. 20338/98 Jilid 4259 Folio 71

(iii) No. Per. 20339/98 Jilid 4259 Folio 72

(iv) No. Per. 20340/98 Jilid 4259 Folio 73

(v) No. Per. 20341/98 Jilid 4259 Folio 74

(vi) No. Per. 20342/98 Jilid 4259 Folio 75

**[6]** The particulars of the registration of the said charges are as indicated at pp. 268-285 and 291-308 of AB1.

**[7]** It is thus the contention of the plaintiff that once the plaintiff's debenture was registered under s. 108 of the Companies Act, the 3rd defendant should have or be deemed to have had notice of the plaintiff's interest in the matter of Bakawali property and that further transactions of the same must be subjected to the said debenture (*Malaysian International Merchant Bankers Bhd v. Highland Chocolate and Confectionery Sdn Bhd & Anor (No. 2)* [1998] 4 CLJ Supp 32). Additionally as the solicitor who conducted the

A debenture transaction between the 1st defendant and the plaintiff and the six charge transactions between the 1st defendant and the 3rd defendant was the same solicitor, the 3rd defendant was deemed to have knowledge of the existence of the said debenture. The plaintiff cited *Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] B 2 CLJ 761 as authority for the proposition where it was held there that "... it is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except – where a solicitor acted fraudulently ..."

C **[8]** In the light of the events enumerated above it was the further contention of the plaintiff that the 1st defendant had committed fraud and that the 3rd defendant was privy to the commission of the said fraud as against the plaintiff. Consequently, following *Public Finance Bhd v. Narayanasamy* [1971] 1 LNS 107, D *Mohamed Isa b. Haji Ibrahim* [1967] 1 LNS 105 and *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21 the 3rd defendant's interest in the said Bakawali property is not indefeasible under s. 340(2)(a) of National Land Code and liable to be set aside as against the plaintiff's claims.

E **[9]** The plaintiff thus proceeded against the 3rd defendant for a declaration that the registered interests of the 3rd defendant under the aforesaid 6 NLC charges is in each case not indefeasible and consequent thereto, an order that the said registered interests be set aside. The plaintiff also prayed for an order that the register F and issue document of title pertaining to the said lands be rectified by the cancellation of the said charges and the memorials there to. Alternatively the plaintiff prayed for an order relating to the issue of priority between the plaintiff and the 3rd defendant in respect of the said Bakawali property. G

**[10]** However the facts which was poignantly ignored by the plaintiff shows that the 3rd defendant's predecessor in title, Chung Khiaw Bank Ltd (CKBL) had granted the 1st defendant loan facilities to purchase the said Bakawali property. The 1st H defendant had on 14 August 1993 agreed to buy the said property from Kemajuan Buditama. The title to the said property had yet to be issued at the time of purchase. To secure the said facilities a Loan Agreement Cum Deed of Assignment (LACDA) was entered between the 1st defendant and CKBL on 20 I November 1993, later to be replaced with legal charge under the provisions of the NLC upon the issuance of the document of title

of the said property. The rights, titles and interests of the 1st defendant under the said sales and purchase agreement were absolutely assigned to CKBL as security for the said facilities. The full terms of the said LACDA are as set out at pp. 65 to 87 of AB1.

**[11]** Additionally the 1st defendant was prohibited during the continuance of the LACDA from among others, executing any form of debenture whether fixed or floating over the Bakawali property without the written consent of CKBL. It is also provided that the LACDA would remain in full force until and unless the transfer and charge were duly registered against the document of title of the Bakawali property or the banking facilities paid in full, which ever happens first.

**[12]** The said LACDA was set out in Form 34 of the Companies Act and registered with the registrar of companies together with Form 40 on 27 November 1993 as evinced at pp. 88 to 93 of AB1.

**[13]** The 1st defendant eventually became the registered proprietor of the Bakawali property on 25 May 1995 when the document of title of the said property was issued on 11 November 1994. Thereafter pursuant to the terms of LACDA, the 1st defendant proceeded to replace the LACDA with legal charges under the provisions of the NLC on 21 April 1998. The said charges were the 6 NLC charges presently under contention enumerated earlier, which forms the basis of the plaintiff's claim.

**[14]** The first defendant purchased the said Bakawali property with monies from the banking facilities provided by CKBL. Meanwhile the said LACDA was vested from CKBL to Chung Kiaw Bank (Malaysia) Bhd (CKBM) pursuant to an order of the High Court on 16 April 1994. Again the said LACDA was vested from CKBM to the 3rd defendant by order of the High Court on 12 May 1997.

**[15]** These salient facts were admitted by the plaintiff as indicated in items 5, 6, 7, 8, 9 and 10 of the document fakta-fakta yang dipersetujui (antara plaintiff dan defendan ketiga), marked as 'A'.

**[16]** On the facts I am with the learned counsel for the 3rd defendant submissions that all the arguments submitted by the plaintiff against the NLC charges *vis-a-vis* the plaintiffs debenture equally apply to the 3rd defendant's position in respect of the

LACDA which was later replaced by the charges under the NLC. It was admitted by the plaintiff that the said LACDA was registered with the ROC in compliance with the provisions of s. 108 of the Companies Act. As argued by the plaintiff, upon such registration, the plaintiff should have or deemed to have had knowledge/notice of the 3rd defendant's interest in respect of the Bakawali property. It is equally the law that upon creation of the debenture and its registration thereof, the 1st defendant's asset was encumbered with the interest of the 3rd defendant and consequently there was no interest or title that the 1st defendant could pass over to the plaintiff, bearing always that the 3rd defendant's interest came first in point of time.

**[17]** Equally the argument of the plaintiff that the 1st defendant had committed fraud against the plaintiff in registering the said 6 charges under the NLC without the prior consent of the plaintiff and that the 3rd defendant was privy to the commission of the said fraud equally applies to the 3rd defendant's position in respect of their LACDA. The plaintiff knew or was deemed to have knowledge of the 3rd defendant's interest in the Bakawali property through the registration of the said LACDA under s. 108 of the Companies Act, but yet they proceeded to create the said debenture. Under the circumstances, the plaintiff was privy to the act of the 1st defendant in defrauding the 3rd defendant. All the more so when the 1st defendant executed the debenture with the plaintiff over the said Bakawali property without the written consent of the 3rd defendant when it was mandated so under the LACDA.

**[18]** Confronted with these factual matrix, the plaintiff now argues that the 3rd defendant's contention that the said six charges were created (as security to purchase the Bakawali property) to replace the LACDA were not supported by the facts of the case. The plaintiff went on to say that apart from the learned 3rd defendant's counsel submission in court that the charges were created to replace the LACDA, no evidence was produced to support such submission.

**[19]** It was further submitted by learned counsel for the plaintiff that the facilities secured under the said charges were new facilities which have no connection with the facilities under LACDA and that there is nothing to show that the charges were created to replace the LACDA.

**[20]** However, in my view the particulars in the document marked A – fakta-fakta yang dipersetujui – speaks for itself. The following are the points of facts that the plaintiff had agreed/admitted in document A. In item 05 of document A, the plaintiff agreed/admitted the following:

> By SPA dated 14 August 1993, the 1st defendant agreed to purchase the Bakawali property from Kemajuan Buditama. Title to the property was yet to be issued at that time

**[21]** By item 06 of document A:

> The 1st defendant obtained banking facilities from Chung Khiaw Bank Limited to finance the said purchase and by Loan Agreement Cum Deed of Assignment (LACDA) dated 20 November 1993 entered between 1st defendant and CKBL the rights, titles and interests of the 1st defendant under the SPA were absolutely assigned to the bank as security therefor.
>
> ...
>
> The 1st defendant covenanted that upon being so required by CKBL issuance of a separate document of title to the Bakawali property take the transfer thereof from Kemajuan Buditama and charge it to CKBL as security for the banking facilities.
>
> The LACDA would remain in full force until and unless the transfer and charge were duly registered against the document of title of the Bakawali property or the banking facilities paid in full, which ever happens first.
>
> The 1st defendant purchased the Bakawali property with monies from the banking facilities.

**[22]** By item 07 of document A:

> Particulars of LAC DA 20 November 1993 were set out in Form 34 dated 23 November 1993 and lodged with ROC together with Form 40 dated 27 November 1993.

**[23]** By item 13 of document A:

> 1st defendant created 6 NLC charges in favour of the 3rd defendant over the Bakawali property as security for the banking facilities ...

**[24]** By item 17 of document A:

> Sime Bank did not obtain the written consent of the 3rd defendant for to debenture dated 25 June 1997.

**[25]** In the light of what has been agreed between the parties indicated above I find it very difficult to digest the plaintiff's submission relating to the same. There can be no doubt that the Bakawali property was purchased by the 1st defendant through the banking facilities provided by the 3rd defendant. The evidence is also very clear that the facilities offered by the 3rd defendant relates to the purchase of the said Bakawali property by the 1st defendant. Obviously the plaintiff cannot approbate and reprobate in the same breath. The plaintiff cannot now deny what they have agreed to from the very beginning.

**[26]** There were also other evidence to support the same. The LACDA itself is replete with references relating to the purchase of the Bakawali property through the utilization of the said banking facilities. This agreement is also included in the Agreed Bundle AB1, as shown at pp. 65 to 87. Clause I refers to the consideration for the LACDA. Clause 8 also talks about the consideration of the assignment. Recitals 6 defined the banking facilities offered by the 3rd defendant which is the consideration for the LACDA. Clause 26 talks about the creation of the NLC charges upon issuance of separate document of title of the said Bakawali land.

**[27]** In my view there are more than enough evidence to link the LACDA with the facilities given by the 3rd defendant's predecessor in title to purchase the Bakawali property with the creation of the 6 NLC charges. Additionally the facts and the documentary evidence linking the same were agreed/admitted by the plaintiff.

**[28]** At the end of the day, in my view there is no issue of fraud here as contended by the plaintiff.

**[29]** On the other hand it rather involved the question of law on the priorities between the plaintiffs debenture dated 25 June 1997 as against the subsequent NLC charges enforced by the 3rd defendant pursuant to LACDA dated 20 November 1993. It is in the fakta-fakta yang dipersetujui, document A, that the LACDA was lodged with the ROC in compliance with s. 108 of the Companies Act. As such upon such registration the plaintiff should have or deemed to have knowledge/notice of the 3rd defendant's

interest in respect of Bakawali property through the LACDA. Though the LACDA provides for consent, the plaintiff did not obtain the said consent from the 3rd defendant before proceeding to create the 25 June 1997 debenture. The cumulative impact of all these is that the 3rd defendant's interest in the Bakawali land is safe. The 1st defendant could not now pass the title or interest in the said property to the plaintiff as the said property was encumbered with the interest of the 3rd defendant at the material time. In short there was no interest or title that the 1st defendant could pass around without the consent of the 3rd defendant. In the event there is nothing for the 3rd defendant to take away from the plaintiff for all along the interest in the Bakawali property has been with the 3rd defendant ever since the creation and registration of the LACDA. Indeed the 1st defendant was only holding the land and/or interest therein as bare trustee for the 3rd defendant.

**[30]** Though the 3rd defendant's interest through the LACDA (20 November 1993) came first in point time in relation to the plaintiff's debenture (25 June 1997), but the NLC charges were created on 21 April 1998 which was subsequent to the creation of the plaintiff's debenture. However in my view the creation or registration of the NLC charges subsequent to the plaintiff's debenture cannot be taken in isolation with the preceding events. The registration of the NLC charges were part and parcel of the LACDA. The 3rd defendant was only enforcing their rights under the LACDA. There is nothing in law to prevent them from doing so. It is an agreed fact that at the time of purchase of the Bakawali property by the 1st defendant, the title to the property has yet to be issued. It is also an agreed fact that the facilities given to the 1st defendant by the 3rd defendant were to be secured by way of loan agreement cum deed of assignment later to be replaced with legal charges under the provisions of the NLC upon issuance of the document of title of the said property. It is also an agreed fact that by item 6 of document A "... the 1st defendant covenanted that upon being so required by CKBL issuance of a separate document of title to the Bakawali property, take the transfer thereof from Kemajuan Buditama and charge it to CKBL as security for the banking facilities ...". The delay in the registration of the charges was without a doubt due to the delay in the issuance of the document of title of the said property which was occasioned through no fault of either the 1st or 3rd

defendant. Had the titles were available at the time of purchase, I am fairly convinced that there is no need for the LACDA and the charges would have been registered forthwith there and then.

**[31]** Consequently the 3rd defendant certainly cannot be deprived of its rights to enforce the terms of the LACDA by insisting that the 1st defendant do replace the loan agreement cum deed of assignment with legal charges under the provisions of the NLC. The creation of the 6 NLC charges is thus proper and regular. There can be no fraud in enforcing one's rights under the law or under the terms of a regular contract.

**[32]** Upon the notion that the NLC charges were part and parcel of the LACDA, the 3rd defendant's interest in the priority ranking is thus not affected. The 3rd defendant's interest without a doubt takes precedence to that of the plaintiff. In this respect I am with the learned counsel for the 3rd defendant's submission that the Bakawali property had from the very beginning been assigned to the 3rd defendant's predecessor in title and as such did not fall under the plaintiff's debenture dated 25 June 1997. If it did, it fell complete with the encumbrance over it of all the rights and interest of the 3rd defendant's predecessor in title under the loan agreement cum deed of assignment which was later replaced with the NLC charges.

**[33]** For all the reasons aforesaid given, the plaintiff's claim is dismissed with costs.